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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PATRICIA A. COVINGTON,
Petitioner,

vs.

SOUTHERN ILLINOIS UNIVERSITY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the "factor other than sex" defense to a wage discrimination claim under the Equal Pay Act, 29 U.S.C. §206(d)(1) and Title VII, 42 U.S.C. §2000e-2(a) et seq., should be limited to legitimate business or institutional objectives of the employer or be otherwise job related?

2. Does permitting a gender neutral "salary retention policy" on job reassignment to constitute the defense of a "factor other than sex" to a wage discrimination claim under Title VII and the Equal Pay Act without a showing of business purpose or job relatedness contravene the *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) "touchstone (of) business necessity" test?

PARTIES IN THE COURT BELOW

Petitioner Patricia Covington was the Plaintiff-Appellant in the court below. Respondent Southern Illinois University was the Defendant-Appellee below. Additionally, Petitioner had proceeded in the court below on the assumption that one C. B. Hunt, a dean of the university, was a Defendant-Appellee in that court. The court, however, in footnote one to its opinion indicated that if Hunt had not been dismissed voluntarily by Petitioner in the district court, that court "probably would have involuntarily dismissed him on the same basis it had dismissed the director and the president." 816 F.2d at 318-319, n.1. (A-2). Petitioner has no quarrel with that statement and proceeds in this Court only against the university.

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Patricia Covington prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the case *Covington v. Southern Illinois University, et al.*, 816 F.2d 317 (7th Cir. 1987), affirming *Covington v. Southern Illinois University, et al.*, No. 83-4138, unpublished, SD. Ill., February 24, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals is reported as set out above and a copy of it is attached as Appendix A to this Petition. (App. A-1). The opinion of the district court is

unreported but is attached as Appendix B to this Petition. (App. B-1)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), this Petition being filed within ninety (90) days of the judgment of the United States Court of Appeals for the Seventh Circuit which was entered April 9, 1987.

CONSITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

1. 29 U.S.C. §206)d)(1), attached hereto as Appendix C. (App. C at A-31).

2. 42 U.S.C. §2000e-2(a), attached hereto as Appendix D. (App. D at A-31).

3. 29 C.F.R. §800.142, attached hereto as Appendix E. (App. E at A-32).

4. 29 C.F.R. § 1620.12, proposed EEOC interpretations (1981) printed in 46 Fed. Reg. 43848 as set out in Appendix F. (App. F at A-33).

5. 29 C.F.R. Part 1620 (August 20, 1986) final rules, supplementary information respecting proposed 29 C.F.R. 1620.12 (1981) as printed in 51 Fed. Reg. 29816 (1986) and as set out in Appendix G. (App. G at A-34).

STATEMENT OF THE CASE

Petitioner brought this action in district court by filing a complaint alleging causes of action pursuant to the Equal Pay Act, 29 U.S.C. §206(d)(1)[1] and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a).[2] Jurisdiction was asserted in the

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[1] See Appendix C at A-31.

[2] See Appendix D at A-31-32.

district court under 28 U.S.C. §1331(a) and 28 U.S.C. §1343(3). The Petitioner alleged that she had been paid substantially lower wages for performing the same job as the undergraduate academic advisor for the school of art at the Respondent University than her predecessor, one Donald Lemasters, had been paid.

After a bench trial, the district court entered a "Memorandum and Order" which document contained findings of fact, conclusions of law and judgment for the Respondent university. The district court concluded that Petitioner had sustained her burden of establishing a prima facie case that she had earned less than her male predecessor Lemasters while performing work equivalent to or greater than that which Lemasters had performed as the academic advisor to the School of Art.

The district court, however, concluded that the Respondent had sustained its burden of proving that the wage disparity between the Petitioner and her male predecessor was based upon a factor other than sex. In particular, the district court found that the university had in place a "salary retention policy" whereby when its personnel were transferred from one department assignment to a separate department assignment, they carried with them the pay rate last earned at the preceding assignment. The district court so held notwithstanding the absence of any evidence that the salary retention policy was designed to further any of the university's academic, business, or institutional objectives or was otherwise job related.

The Petitioner appealed to the United States Court of Appeals for the Seventh Circuit from the district court's judgment. On April 9, 1987, the Court of Appeals entered judgment affirming the district court. 816 F.2d 317 (7th Cir. 1987). (A-1) In so doing, the Court of Appeals rejected Petitioner's argument that the factor other than sex defense to actions under the Equal Pay Act and Title VII is limited either to business related reasons or, more narrowly, to factors that relate to the requirements of the job or to the individual's performance of that job. 816 F.2d at 321-22. (A-7-8)

STATEMENT OF THE FACTS

The Petitioner was hired effective Fall, 1974 as an instructor in the school of art, a department of the College of Communications and Fine Arts at Southern Illinois University.[3] At the time she was hired, the school of art was experiencing substantial growth. Petitioner's primary responsibility when she was hired was to perform the undergraduate academic advising. The undergraduate academic advising function was considered by the university to be a valued and responsible position. Petitioner also performed regular teaching duties and was later assigned, in addition, various administrative responsibilities.

Petitioner was hired at the initial salary in Fall, 1974 of $800.00 per month. She thereafter received many "merit raises" which were the product of her outstanding performance and service to the university. The university considered that merit raises were earned by the academic employee and were not the function or product of cost of living, equity or other factors. Petitioner's background which prepared her for her position consisted of secondary school teaching in New Mexico, work as the director of a division of the Peabody Museum, work as the curator of exhibits at the New Mexico State Museum, and two years teaching as a teaching assistant at Southern Illinois University. All Petitioner's positions prior to being hired were art related.

When she was hired in the Fall, 1974, Petitioner replaced one Donald Lemasters. Lemasters had been the undergraduate academic art advisor in the school of art since Fall, 1971, and had been ranked as an instructor. He was removed from the school of art academic advising position effective at the conclusion of the academic year 1973-74 by the director of the school of art for inadequate performance.

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[3] Faculty ranks at SIU in ascending order are lecturer, instructor, assistant professor, associate professor, and professor.

Before going to art, Lemasters had taught four years of trumpet in the school of music, another department within the College of Communications and Fine Arts. His initial pay in the school of music had been $900.00 in Fall, 1967. He received intermittent raises so that by his final academic year in the school of music, 1970-71, he was earning $1,080 per month.

Lemasters' appointment in the school of music terminated when the individual whom he had replaced as the trumpet instructor returned after a tour of duty with the United States Navy. The Assistant Dean of the College of Communications and Fine Arts, a friend of Lemasters', arranged that Lemasters be assigned to fill a vacancy in the undergraduate academic advising position in the school of art beginning Fall, 1971. At the time he began his assignment in the school of art, Lemasters had not been tenured in any department. Although qualified for his music position, Lemasters had no academic background or experience which prepared him for academic work in the school of art.

Lemasters' last salary position in the school of music of $1080 per month went with him to the school of art pursuant to the Respondent University's "salary retention policy." He received periodic raises while in art whereby by academic year 1973-74 he was earning $1280 per month after which he was replaced by Petitioner at $800 per month.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit's Decision In This Case Conflicts With the Decisions of the Third and Ninth Circuits And the Arizona Supreme Court Respecting The First Question Presented In This Case; This Is An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court.

1. The Seventh Circuit's Holding in This Case

The Court of Appeals rejected Petitioner's "primary argument that factors other than sex for purpose of EPA (Equal Pay Act) and Title VII are limited either to business related reasons, or more narrowly, to factors that relate to the requirements of the job or to the individual's performance of that job". 816 F.2d at 321. (A-7-8) In deciding against Petitioner, the Court of Appeals said that Petitioner's "contention that factors other than sex must be related to the requirements of the particular position in question (had) not been adopted in (the Seventh) Circuit and was implicitly rejected in two cases . . . ." *Id.* at 322. (A-8). The court then concluded that it did not "believe that the EPA preclud(ed) an employer from implementing a policy aimed at improving employee morale when there is no evidence that that policy is either discriminatorily applied or has a discriminatory effect." 816 F.2d at 322. (A-8).

In footnote seven to its opinion, the Seventh Circuit acknowledged that the "improvement of employee morale" statement was only a claim Respondent made in that court. *Id.* at 322 n. 7. (A-8) The record, however, is clear that Respondent did not make, let alone prove, that claim in the district court.

Moreover, even assuming "improvement of employee morale" had been proved to be the reason for the university's salary retention policy, which it was not, the Seventh Circuit did not address how that reason might have "reasonably

explain(ed)", *Kouba v. Allstate Insurance Co.*, 691 F.2d 873, 878, (9th Cir. 1982), its use of the salary retention policy "in light of the (university's) stated purpose as well as its other practices." *Id.* at 876-77. Nor, did the Seventh Circuit explain how "improvement of employee morale" might be achieved by paying a female less for performing the same academic function as her male predecessor.[4]

2. The Third and Ninth Circuits' And The Arizona Supreme Court's Contrary Holdings

Prior to the Seventh Circuit's decision in this case, the Third and Ninth Circuits had specifically addressed the question posed by Petitioner, namely whether or not the factor other than sex defense to an Equal Pay Act claim and a similar claim under Title VII (see *County of Washington v. Gunther*, 452 U.S. 161, 170-171 (1981)) should be related to the business or institutional objectives of the employer or be otherwise job related. The Third Circuit in *Hodgson v. Robert Hall Clothes Inc.*, 473 F.2d

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[4] The court also suggested that Lemasters may have had superior experience and better degree requirements for his music position than Petitioner had for the art position. But, the court recognized that Petitioner may well have been correct in her argument that Lemasters' qualifications for the school of music did not relate to or enhance his qualifications and ability as an art advisor, the position both held in common. 816 F.2d at 324. (A-12).

The Seventh Circuit additionally noted the district court's conclusion that a "financial exigency" had contributed to Petitioner's low starting pay. However, the court did not resolve the correctness of the district court's conclusion in this respect in the face of a provision in the university's declaration of "financial exigency" that the exigency would not be used to sacrifice the university's commitment to affirmative action programs. *Id.*, 324-325. (A-13-14). In addition to that provision, the testimony of the university officials at trial was uncontradicted that the financial exigency was not intended to defeat the university's obligations under the Equal Pay Act. Reporter's Transcript P. 458.

589 (3d Cir. 1973)[5] held that "economic benefits to an employer can justify a wage differential." 473 F.2d at 594. Additionally, the Third Circuit in *Robert Hall* said that "while no business reason could justify a practice clearly prohibited by the act, the legislative history . . . indicates a Congressional intent to allow reasonable business judgments to stand." *Id* at 597.

In 1982, the Ninth Circuit decided *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), wherein Allstate Insurance Company was found to have computed the minimum salary guaranteed to new sales people on the basis of, among other things, prior salary. 691 F.2d 874. The result of that practice was that female agents, on the average, made less money than their male counterparts for doing the same work. *Id.* at 875. The district court entered summary judgment against Allstate, reasoning that because so many employers paid discriminatory salaries in the past, the court would presume that a female agent's prior salary was based under gender unless Allstate presented evidence to rebut that presumption. Second, the district court held that absent such a showing by an employer, prior salary was not a factor other than sex.

On appeal, the Ninth Circuit analyzed the scope of the "factor other than sex" defense and in so doing concluded that

> "The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on

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[5] In *Robert Hall,* the defendant was a department store containing a department for men's and boys' clothing on the one hand and another department for women's and girls' clothing. The men's and boys' clothing department had significantly greater sales, gross profit and gross profit percentage than the ladies' and girls' department and more sales per hour. On this basis, the male employees of the men's and boys' department were paid a higher base salary than the female employees in the women's and girls' department. Additionally, the amount of incentive compensation for the males was slightly greater than for the females.

> some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason. Conversely, a factor used to effectuate some business policy is not prohibited simply because a wage differential results.

Kouba, supra at 876. The court in *Kouba* acknowledged, however, that "(e)ven with a business related requirement, an employer might assert some business reason as a pretext for a discriminatory objective . . . (and) this possibility (was) especially great with a factor like prior salary which can easily be used to capitalize on the unfairly low salaries historically paid to women". (citing cases). *Id.*

Nonetheless, the Kouba court said that "(a) pragmatic standard, which protects against abuse yet accommodates employer discretion, is that the employer must use the factor (other than sex) reasonably in light of the employer's stated purpose as well as its other practices." *Id* at 876-77. On that basis, the Ninth Circuit remanded to give Allstate an opportunity to prove that the business reasons it advanced (sales incentive and ability) "reasonably explain(ed) its use of (prior salary history) before finding a violation of the Act." *Id.* at 878.[6]

After *Kouba,* the Ninth Circuit, per Judge Wallace, addressed and reaffirmed its holding in *Maxwell v. City of Tuscon,* 35 FEP Cases 355 (9th Cir. 1984). The court held that the factor

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[6] In the instant case, unlike *Kouba, supra,* the Respondent did not even advance a reason for its "salary retention policy", let alone show how that reason "reasonably explain(ed)" the policy "in light of the (university's) stated purpose." Thus, the Seventh Circuit's attempt in this case to partially distinguish *Kouba* on the basis that the prior salary in *Kouba* originated with other employers and not the same employer as in this case misses the point. The point is how whatever the factor is reasonably explained "in light of the employer's stated purpose . . ." *Kouba* at 876-77.

other than sex "did not give the employer carte blanche to eviscerate the act's remedial aims, but does embrace not only sound business reasons like the one in *Kouba,* (minimum salary commission bonuses depend upon prior salary), but also factors such as anticipatory hiring . . . ." (citing *Campbell v. VonHoffman Press Inc.,* 632 F.2d 69 (8th Cir. 1980)) or economic benefit to the employer derived from a legitimate business judgment . . ." (citing *Robert Hall, supra*) 35 FEP cases at 358-59. On this basis, the court upheld the district court's conclusion that higher wages paid a male predecessor in a public administrative position than those paid the female successor were not justified as a factor other than sex where the position had been administratively downgraded but the essential job function remained the same.[7]

Before *Maxwell,* the Ninth Circuit had specifically applied the rationale of *Kouba* to an academic setting in *Hein v. Oregon College of Education,* 718 F.2d 910 (9th Cir. 1983). Therein the factor other than sex defense was tied to "legitimate institutional interests". 718 F.2d 910 at 921. Those interests in an academic setting, the *Hein* court said, related to the "special characteristics of an academic community, the uniqueness of its members (which) serv(ed) to emphasize the necessity for a thorough and sensitive appraisal of (the university's) affirmative defenses." *Id.*

Additionally, the Arizona Supreme Court addressed and resolved the first question presented in this petition in *Higdon v.*

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[7] The court did, however, find the existence of a merit system and thereby vacated the district court's judgment as to the full extent of the plaintiff Maxwell's damages and remanded the matter to the district court for further consideration. On remand, the district court took no new evidence and entered judgment on Plaintiff's Title VII claim in her favor. The city appealed again, and this time the Ninth Circuit affirmed the district court's findings and conclusions in plaintiff's favor. *Maxwell v. City of Tuscon,* 803 F.2d 444 (9th Cir. 1986).

Evergreen International Airlines, 138 Ariz. 163, 673 P.2d 907 (1983)(en banc). In so doing, on the authority of *Kouba, supra,* the Arizona court adopted a "business related" rather than "job related" standard for a claim arising under the Equal Pay Act and the Arizona Civil Rights Act. 673 P.2d 907, 910-11.

3. The Law In The Remaining Circuits

The only other circuit to have directly addressed the first question posed in this case is the Sixth Circuit in *Bence v. Detroit Health Corporation,* 712 F.2d 1024 (6th Cir. 1983). In *Bence,* the Court of Appeals accepted the district court's findings that the essential work done by the males and the females was the same. The employer advanced the defense that it had to pay the males a higher commission for procuring male health club memberships for the reason that there was greater ease for the female managers in selling female health club memberships and the employer's desire was to equalize the pay of the males with the females. The employer argued that his rationale brought him within the Third Circuit's "business judgment" holding in *Hodgson v. Robert Hall, supra.*

However, the Sixth Circuit in *Bence,* acknowledging that "(f)ew courts have addressed this problem explicitly . . . ," 712 F.2d at 1030 found the *Robert Hall* holding incongruous with the problem presented in *Bence.* Nevertheless, the Sixth Circuit struck down the commission payment differential between men and women. But, in so doing, the court refused to address the problem posed and neither accepted nor rejected the "business judgment" reading of 29 U.S.C. §206(d)(1)(iv) articulated in both *Robert Hall, supra* and *Kouba, supra* saying that "those are questions for another day," 712 F.2d at 1031. The *Bence* court thus limited its holding to the facts of the case.

The other circuits which have addressed the "factor other than sex" issue and its scope include the First, Fourth, Fifth,

and Eighth Circuits.[8] However, no overriding or guiding principle seems to enlighten any of the decisions considering the scope of that defense.

Therefore, except in the Third and Ninth Circuits, the status of the law respecting the "factor other than sex defense is one of uncertainty. This Court has not considered the issue since *County of Washington v. Gunther,* 452 U.S. 161 (1981) when it remarked that the legislative history of the Equal Pay Act suggested that the factor other than sex defense was enacted because of a concern that "bona fide job evaluation systems used by American business would otherwise be disrupted...." *County of Washington v. Gunther,* 452 U.S. 161, 170-71, n. 11, citing *Corning Glass Works v. Brennan,* 417 U.S. 188, 199-201

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[8] *See, e.g., Lamphere v. Brown University,* 685 F.2d 743, 750 n. 2 (1st Cir. 1982), holding that "friendship" may have explained a salary differential between plaintiff and her comparator, however noting that "the more idiosyncratic or questionable an employer's reason, the easier . . . to expose it as a pretext if indeed it is one."; *EEOC v. Aetna Insurance Co.,* 616 F.2d 719 (4th Cir. 1980), holding that a salary differential was justified on existence of two distinct salary programs, one for new hires and the other for existing hires; also suggesting that a male employee's availability for management position justified finding a factor other than sex; *Hodgson v. Brookhaven General Hospital,* 436 f.2d 719, 726 (5th Cir. 1970), rejecting "market conditions" as a factor other than sex); *Strecker v. Grand Forks County Social Services,* 640 F.2d 96 (8th Cir. 1980), whereby the panel opinion was adopted en banc March 10, 1981, holding that civil service personnel classification system by itself constituted a factor other than sex where that classification system resulted in a pay differential between a male and female employee doing essentially the same work; *Campbell v. Von Hoffman Press,* 632 F.2d 69 (8th Cir. 1980), holding that anticipatory hiring of male for a position which did not develop until a year after hire justified payment of greater wages for doing the same work as a female in the interim.

(1974).[9] However, as can be seen, the circuits have strayed significantly from the moorings of limiting the factor other than sex to "bona fide job evaluation systems." *County of Washington v. Gunther, supra* at 170-71, n. 11.

4. The Administrative Situation

The rudderless state of the factor other than sex defense except in the Third and Ninth Circuits is exacerbated by an administrative interpretative vacuum which exists at this time. As originally enacted, Congress granted enforcement authority over the Equal Pay Act to the Secretary of Labor as part of the Fair Labor Standards Act of 1938. H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, reprinted in 1963 U.S. Code and Congressional and Administrative News 687, 689. However, pursuant to authority granted him by the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (codified at 5 U.S.C. §§903-912 (1982)), President Carter transferred administrative enforcement of the EPA from Secretary of Labor to the Equal Employment Opportunity Commission (EEOC). Reorg. Plan No. 1 of 1978, reprinted in 5 U.S.C. §903 (at 196) (1980) and in 92 Stat. 3781 (1978). However, the Reorganization Act of 1977 contained a legislative veto provision. Reorganization Act of 1977, §906(a) Pub. L. No. 95-17, 91 Stat. 29, 32 (codified at 5 U.S.C. §906(a) (1982)). This Court declared the legislative veto provision unconstitutional in *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983). But, Congress subsequently attempted to ratify any prior reorganization plan which contained a legislative veto provision. Act of October 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705 (1984).

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[9] On the basis of this Court's dictum in *County of Washington v. Gunther, supra* the district court in *Schulte v. Wilson Industries,* 547 F.Supp. 324 (S.D. Tex. 1982) suggested that the factor other than sex defense was, on the authority of *County of Washington v. Gunther, supra,* limited to a "bona fide job rating system." 547 F.Supp. 324 at 339 n. 16.

As interpreted by the various circuit courts of appeals, the *Chadha* decision initially cast doubt as to whether EEOC could enforce the Equal Pay Act. For example, the Second Circuit held that the legislative veto provision was not severable from the rest of the Reorganization Act of 1977 and that Congress did not ratify the Reorganization Act through subsequent appropriations bill. See *EEOC v. Columbia Broadcasting Systems,* 743 F.2d 969 (2d Cir. 1984). However, after Congress passed the Act of October 19, 1984, the Second Circuit decided that the EEOC could enforce the ADEA. *EEOC v. Columbia Broadcasting Sys.,* 748 F.2d 124 (2d Cir. 1984) and all circuits which have decided the issue now agree that the EEOC has enforcement authority over the EPA. See for example *EEOC v. Westinghouse Electric,* 765 F.2d 389 (3d Cir. 1985); *EEOC v. First Citizens Bank,* 758 F.2d 397, 399-400 (9th Cir.), *cert. den.* (1985).

Prior to the regulatory turmoil created in the aftermath of *Chadha, supra,* the EEOC had promulgated proposed guidelines for interpretation of the Equal Pay Act, 46 Fed. Reg. 43848 (1981), proposed to be codified at 29 C.F.R. §§1620.01-1620.18. Meanwhile, after *Chadha,* the Department of Labor in 1984 updated guidelines that it already had in effect interpreting the Equal Pay Act. See 29 C.F.R. §§800-800.166 (1984).

Respecting the interpretation of the exceptions to the Equal Pay standard in §§800.140 through 800.151, most specifically applicable to the factor other than sex defense, the Secretary of Labor's regulations specified in 29 C.F.R. §800.142 (1984) that

> "however, to come within the exempting provisions, any system or factor of the type described pursuant to which a wage rate differential is paid must be applied equally to men and women whose jobs require equal skill, effort, and responsibility and are performed under similar working cond~~itions~~s. *Any evaluation, incentive, or other payment plan which establishes separate and different 'male rates'*

> *and 'female rates' without regard to job content will be carefully examined to determine if these rate differentials* are based on sex in violation of the Equal Pay requirements."

29 C.F.R. §800.142. [Emphasis supplied]

The regulations proposed in 1981 by the EEOC went even further in specifying a standard. For example the regulation proposed in 1981 by the EEOC to be codified at 29 C.F.R. §1620.12 under the heading "Permissible Bases for Pay Differentials specified that":

> (b) In determining whether such systems or employment practices are valid explanations of the pay differential, the following principles are applied:
>
> (1) The standard system or test must be completely nondiscriminatory and lacking any element of sex discrimination either expressly or impliedly.
>
> (2) It must be uniformly applied to men and women employees.
>
> (3) The system must be bona fide and must be the genuine basis of the pay differential.
>
> (4) Even though the standard, system or test is neutral on its fact, and purports to be based on a factor other than sex, *it is discriminatory if it has an adverse impact on members of one sex in providing them a lower rate of pay and if it cannot be shown to be related to job performance.*

46 Fed. Reg. 43848, at 43851-82 (1981) [Emphasis supplied].

However, effective August 20, 1986, the EEOC promulgated its final rules. 51 Fed. Reg. 29816-29826 (August 20, 1986). In so doing, the supplementary information provided by the EEOC indicated that proposed 1981 regulation §1620.12 as above set forth "was deleted because the Commission believe(d)

that it did not provide adequate guidance." 51 Fed. Reg. at 29816 (August 20, 1986). Nothing was put in its place. *Id.*

However, the final rules adopted by the EEOC did provide interpretative guidelines specifying that certain "factors" would not be considered a factor other than sex. Those include "head of household", 29 C.F.R. 1620.21; employment costs, 1620.22, and collective bargaining agreements, 1620.23. Moreover, the EEOC promulgated 1620.26 defining "red circle" rates and specifying that if a red circle rate existed for more than a month, it was suspect.[10]

5. Importance of the Question Presented — Need For Resolution By This Court

Except for the specific rule in the Third and Ninth Circuits and except for the specific items identified by EEOC as not constituting factors other than sex, there are no standards guiding what is and what is not a factor other than sex. This uncertain circumstance is made all the more pronounced by the Seventh Circuit's specific refusal in this case to adopt the business related rule of the Third and Ninth Circuits and otherwise failing to delimit or circumscribe the factor other than sex defense. This would seem to mean that in the Seventh Circuit and in any other circuit besides the Third and the Ninth which might decide to follow the Seventh Circuit's holding in this case, the factor other than sex defense might be what both the Secretary of Labor on behalf of the female employees, and the employer in *Hodgson v. Robert Hall, supra* at 593 and 594 argued was not the case, namely that Congress did not mean "*any* other factor" when it said "any other factor than sex". [Emphasis in original].

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[10] The current regulations define a "red circle" as a term "used to describe certain unusual, higher than normal, wage rates which are maintained for reasons unrelated to sex...", such as "where a company wishes to transfer a long service employee who can no longer perform his or her regular job because of ill health, to different work which is...being performed by opposite gender employees."

Therefore, taken literally under the Seventh Circuit's holding in this case, the most "idiosyncratic (and) questionable", see *Lamphere v. Brown, supra* 685 F.2d at 750 n. 2, factor could provide the basis for a wage differential between men and women performing the same work if that "idiosyncratic (and) questionable" factor were not in fact based on sex. That being the case, what stands to happen in the Seventh Circuit and any other circuit following its lead would be that the "exception (could indeed) swallow the rule". See *Brennan v. Victoria Bank & Trust,* 493 F.2d 896, 902 (5th Cir. 1974). See also Note, *The Exception Swallows the Rule: Market Conditions As a 'Factor Other than Sex' in Title VII Disparate Impact Litigation,* 86 W. VA. L. REV. 165, 170 (1983).

Petitioner, therefore, respectfully urges this Court to grant the writ and consider her argument that the factor other than sex defense be limited to those factors which can be shown to be related to the business or institutional objectives of the employer or be otherwise job related.[11] Without such con-

[11] Petitioner argued in the court of appeals that Respondent might have tried to demonstrate that Lemasters' tenure at the university added to the academic stature of the university, added to the economic worth of the university, or otherwise contributed to the university in any one of its multifaceted aspects from which it could have been inferred that his presence lent something of value for which he was entitled to greater compensation. Petitioner's Brief in Court of Appeals at 27. It does not seem necessary at this stage to define the scope of "business or institutional objectives or job relatedness". However, guidance is provided by this Court's decisions in such cases as *Dothard v. Rawlinson,* 433 U.S. 321, 329, 331 n. 14 (1977) referring to a "manifest relationship to the employment in question," and "necessary to safe and efficient job performance" as standards for permitting the employment practice; *New York City Transit Authority v. Beazer,* 440 U.S. 568, 587 n. 31 (1979) requiring only that safety and efficiency be "significantly served" by a defendant's policy against hiring Methadone users, without elaborating on the standard how it is determined that legitimate goals are "significantly served". See also *Contreras v. City of Los Angeles,* 656 F.2d 1267, 1280 (9th Cir. 1981) specifying a standard "significantly correlated with important elements of work behavior"; *Chrisner v. Complete Auto Transit Inc.,* 645 F.2d 1251, 1262 (6th Cir. 1981) "substantially promote the

sideration, the firm, overriding national public commitment to equal pay for equal work created by two distinct statutory schemes, see *Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974);[12] and *County of Washington v. Gunther,* 452 U.S. 161, 171-72, 178-80,[13] will be subject to ad hoc determinations on whether a particular factor does or does not constitute a factor other than sex thereby exempting employers from the operation of the public policy. Oftentimes, those determinations will, without the benefit of this Court's guidance, create great geographic disparities in the operation of the national commitment to pay equality for equal work. Oftentimes, those determinations will be in derogation of that national public commitment as, it is respectfully suggested, happened in the instant case in the court of appeals.

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proficient operation of business"; and *Robinson v. Lorillard Corp.,* 444 F.2d 791 (4th Cir.), *cert. dis'd,* 444 U.S. 1006 (1971), specifying that the test "is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." *Id.* at 798. See also, Comment, *The Business Necessity Defense to Disparate Impact Liability Under Title VII,* 46 U. CHI. L. REV. 911 (1979); Comment, *Sex — Based Wage Discrimination Under Title VII Disparate Impact Doctrine,* 34 STAN. L. REV. 1083, 1092 (1982).

[12] "Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry — the fact that the wage structure of "many segments of American industry have been based on ancient but outmoded belief that a man, because of his role in society, should be paid more than a women even though his duties are the same." (Citing S. Rep. No. 176, 88th Cong., 1st Sess., 1, (1963)). The solution adopted was quite simple in principle: to require that 'equal work will be awarded by equal wages.' " *Corning Glass Works v. Brennan, supra* at 195.

[13] "Title VII was the second bill relating to employment discrimination to be enacted by the 88th Cong. Earlier, the same Congress passed the Equal Pay Act 'to remedy what was perceived to be a serious and endemic problem of (sex based) employment discrimination in private industry.' " *County of Washington v. Gunther, supra* at 171, quoting *Corning Glass Works v. Brennan, supra* at 195.

II.

The Decision of the Court of Appeals Is in Conflict With This Court's Decision In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) Requiring That Practices Which Are Fair in Form Be Shown to Be Related to Business Necessity Or Job Performance If Those Practices Create A Discriminatory Result.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court held in a Title VII action that facially neutral tests or requirements imposed by an employer are prohibited if they have a discriminatory impact absent a showing that those tests or requirements are job related or otherwise justified by business necessity. 401 U.S. 424 at 431. In writing for the Court, Chief Justice Burger stressed that Congress, in enacting Title VII, was concerned with "the *consequences* of employment practices, not simply the motivation." 401 U.S. at 432. (Emphasis in original). Moreover, this court held that the employer had the burden of showing that its hiring criteria were related to the specific jobs to which those criteria purportedly applied. *Id.*

Subsequently, in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), this Court, emphasizing the statutory language of Title VII, held it was "unambiguous" (*Manhart* at 708) that Title VII "focus(ed) on the individual ..." *Id.* This Court, per Justice Stevens, stated that Title VII "preclud(ed) treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.*

Then, ten years after *Griggs, supra* in *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court held in the wake of the Bennett Amendment (42 U.S.C. §2000e-2(h))[14] that respec-

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[14] "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer of such differentiation as authorized by the provisions of §206(d) of Title 29." (The Equal Pay Act). 42 U.S.C. §2000e-2(h).

ting wage discrimination claims, Title VII actions incorporated the affirmative defenses prescribed by Congress in the Equal Pay Act. This Court held in *Gunther* that the Bennett Amendment was designed to insure that a consistent body of law developed respecting wage claims under Title VII and the Equal Pay Act. 452 U.S. at 170. In so doing, this Court acknowledged that the "incorporation of the fourth affirmative defense (factor other than sex) could have significant consequences for Title VII litigation." *Id.*

This case presents an important aspect of those "significant consequences" represented by the application of the factor other than sex defense to Title VII litigation. The concerns of this Court in *Griggs v. Duke Power Co., supra* with the "*consequences* of employment practices..." *Griggs, supra* at 432, (emphasis in original) would go for naught if a facially neutral factor other than sex defense in a wage claim under Title VII were considered on any basis other than its consequences, as happened in this case. If, moreover, the cases develop whereby Title VII wage claims are considered from the standpoint of the consequences in response to a neutral factor other than sex as required by *Griggs, supra,* but Equal Pay Act cases are considered without regard to the consequences as the Seventh Circuit considered this case, then there "might develop inconsistent bodies of case law interpreting two sets of nearly identical (statutory) language." *County of Washington v. Gunther, supra* at 170. That result would clearly be contrary to the holding of this Court in *Gunther.*

It has been argued that the literal interpretation of the factor other than sex defense of the Equal Pay Act could bar disparate impact wage claims under both Title VII and the Equal Pay Act. See Comment, *Sex — Based Wage Discrimination Under The Title VII Disparate Impact Doctrine,* 34 STAN. L. REV. 1083, 1092 (1982). However, the comment author, relying on Judge Heaney dissenting in *Strecker v. Grand Forks County Social Services, supra* at 640 F.2d 96, 104-109 and *Kouba v. Allstate*

Insurance Co., supra, argued that an employer should be required to demonstrate that a legitimate business concern justifies the wage differential once the factor creating that differential is identified. Comment, *supra* at 1094.[15] In this respect, the author said that even though Equal Pay Act cases "have not clearly articulated the nexus between the business concern and the wage differential that will satisfy the (factor other than sex) defense" *Id.,* the Title VII "business necessity defense under *Griggs* provides a readily available standard which is roughly consistent with the interpretation of the factor other than sex defense in Equal Pay Act cases. *Id.* at 1094-95.

Judge Heaney's dissent in *Strecker, supra* speaks to the issue in this case. He argued that the defendants had done nothing more than prove the existence of the state's personnel classification system which caused the pay differential between the male and female doing the same work. But, he argued "(i)f the defendants' conduct (was) to be shielded by the affirmative defense (factor other than sex) provided by the Equal Pay Act, it was necessary for them...to establish that the classification system's requirements were reasonably related to the jobs to be performed." *Strecker, supra* at 104, Heaney, J. Dissenting. This position Judge Heaney argued on the authority of *Griggs v. Duke Power Co., supra.* See also *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1974).

It may be that something such as a "salary retention policy" on job reassignment could be shown to be "reasonably related to the job to be performed". *Strecker, supra* at 104, Heaney J. dissenting. Perhaps, it could be shown that such policy was in fact conducive to the enhancement or benefit of the university

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[15] See also Note, *"Market Value As A Factor Other Than Sex In Sex Based Wage Discrimination Claims,* 1985 U. OF ILL. L. REV. 1027 and Katz, *"Wage Discrimination Claims: Employee's Prior Salary History Fails The "Factor Other Than Sex Test"*, 15 COL. HUMAN RIGHTS L. REV. 207.

employer in one or more of the university's multifaceted aspects.

But, none of that was attempted, let alone shown in this case and the court of appeals said that did not matter. So saying, the court of appeals has disregarded the clear unanimous directive of this Court in *Griggs, supra* that Title VII and the Equal Pay Act, *County of Washington v. Gunther, supra,* were concerned with the "*consequences* of employment practices..." *Griggs, supra* at 432, (emphasis in original). The consequence of the employment practice in this case was a wage disparity between Petitioner and her comparator Donald Lemasters. This Court should, therefore, grant the writ and review the court of appeals' judgment in light of *Griggs v. Duke Power Co., supra.*

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court grant a writ of certiorari to issue the United States Court of Appeals for the Seventh Circuit and pursuant thereto review the judgment and opinion of that court.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1445

Patricia Covington,
Plaintiff-Appellant,

vs.

Southern Illinois University, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois, Benton Divisioin.
No. 83 C 4138 — James L. Foreman, Judge.

Argued November 3, 1986 — Decided April 9, 1987

Before Cummings and Cudahy, *Circuit Judges,* and Marovitz, Senior District Judge.*

Cudahy, *Circuit Judge.* Patricia Covington, an assistant professor of art at Southern Illinois University's Carbondale campus ("SIU"), sued the university under Title VII, 42 U.S.C. § 2000e *et seq.* (1982), and the Equal Pay Act (the "EPA"), 29 U.S.C. § 206(d) (1982), claiming that SIU discriminated against her on the basis of sex by paying her less than her male

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* Honorable Abraham L. Marovitz, Senior District Judge for the Northern District of Illinois, is sitting by designation.

predecessor for performing the same work.[1] After a bench trial, the district court found for the university, and Covington appeals. We affirm.

I.

SIU's College of Communications and Fine Arts contains, among other academic units, the School of Art and the School of Art and the School of Music. In the summer of 1971, Donald Lemasters became the academic advisor for art students, replacing Violet Trovillion, who was retiring. Lemasters held a bachelor of music degree from the St. Louis Institute of Music and a masters of music degree from Northwestern University. A masters of music degree is recognized by the School of Music of SIU as a "terminal" degree (i.e., a degree qualifying one for promotion and tenure) for faculty members teaching applied music. Prior to assuming the position of art advisor, Lemasters

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[1] Covington sued, in addition to SIU, a number of individual defendants, including the president of SIU, the dean of the College of Communications and Fine Arts, the director of the School of Art and the members of the Board of Trustees of SIU. After resting her case, plaintiff agreed to dismiss all of the individual defendants except the president and the director of the School of Art. *Covington v. SIU, et al.*, No. 83-4138, mem. op. at 3 n.1 (S.D. Ill. Feb. 24, 1986). The district court granted the defendants' motion for an involuntary dismissal as to these two remaining individual defendants because they werre not "employers" for purposes of Title VII, 42 U.S.C. § 2000e(b) (1982), and the EPA, 29 U.S.C. § 203(d) (1982). Mem. op. at 13.

Covington claims on appeal that the district court erred in concluding that she had agreed to voluntarily dismiss the dean as a defendant. The transcript of the proceedings as to this point is ambiguous. Appellant's Appendix at 199a. However, even if the plaintiff did not dismiss the dean, the district court probably would have involuntarily dismissed him on the same basis that it dismissed the director and the president. In any event, Covington does not appeal the dismissal of any of the individual defendants.

In addition to her Title VII and EPA claims, Covington also brought a section 1983 claim, 42 U.S.C. § 1983 (1982), which was dismissed after she informed the district court that she was no longer pursuing it. Mem. op. at 3 n.1.

held a variety of positions outside of SIU as well as within the university. He was a professional trumpet player from 1942 until 1951. From 1948 through 1967, he was a band director at various grade schools, high schools and music camps; he taught part-time at high schools for five years. He was also a partner in a music store from 1952 until 1955 and sold musical instruments through 1972. Lemasters was initially employed by SIU during the late 1950's and early 1960's as a part-time lecturer in trumpet and French horn.[2] On the recommendation of the chairman of the School of Music, Lemasters was offered an assignment as a full-time instructor teaching brass instruments in August of 1967 at a salary of $900 per month. Lemasters was hired to fill a vacancy created by the military enlistment of Larry Franklin, a member of the music faculty.

Franklin returned to the School of Music in the fall of 1971, and as a consequence, Lemasters was transferred to the position of art advisor, apparently with the understanding that he would take over the responsibility of music advisement when the current music advisor retired. Lemasters made $1,080 per month during the 1970-71 academic year, and his salary did not change when he was assigned to the art advisor position. SIU's policy is that a faculty member's change of assignment does not result in a decrease in salary. Even though Lemasters advised art students, his official assignment was 75% to the College of Communications and Fine Arts and 25% to the School of Music; his salary was not part of the art school budget. In December 1971, Lemasters' salary was increased to $1,140 per month. He received tenure in the School of Music in the fall of 1972, and his salary was increased to $1,200 per month for the 1972-73 school year. During the 1973-74 academic year, Lemasters earned $1,280 per month.[3] Professor Milton Sullivan

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[2] Faculty rank at SIU, in ascending order, is as follows: lecturer, instructor, assistant professor, associate professor and professor. Mem. op. at 5.

[3] During the time Lemasters was assigned as art advisor, he may have taught a class on trumpet repair. This point was not conclusively established at trial. Mem. op. at 8 & n.3.

became the director of the School of Art in the fall of 1973, and he sought to have Lemasters replaced as art advisor because he was dissatisfied with his work. Lemasters was reassigned to the School of Music effective July 1, 1974 and taught full-time there from the fall of 1974 until his death in September 1981.

Sullivan recommended that the plaintiff be hired to replace Lemasters at a starting salary of $800 per month. At the time he proposed this salary, Sullivan was not aware what Lemasters was being paid because his salary did not come out of the School of Art's budget. According to Sullivan, Covington's initial salary was based upon an evaluation of the position of art advisor, her qualifications and guidelines specifying the ranges of salary by rank. In addition, at the time Covington was hired, the university was experiencing financial difficulties. Because Lemasters had not been paid out of the School of Art's budget, Sullivan had to request new funds to pay Covington's salary at a time when SIU was implementing cost-cutting measures that included the release of a number of faculty members.

In July 1974, Covington started work as art advisor at a salary of $800 per month. Covington had little teaching experience at the time she was hired by SIU. She had taught one year at the high school level and had been employed as a teaching assistant in the School of Art at SIU beginning in 1972 while she worked towards her masters degree in education. Although she received her masters degree in August 1974, this degree did not qualify her for tenure or promotion within the School of Art. As of August 1974, Covington performed all the advisement duties performed by Lemasters and, in addition, taught classes.

Covington did an outstanding job at SIU and received many merit pay raises. In December 1974, Covington's salary was increased to $879 per month. This raise was given as a result of an equity study undertaken by the university to identify those with inequitable salaries and to increase their salaries within the limits of available dollars. Covington's salary was raised for the 1975-76 school year to $987 per month. In June 1976, her duties were changed from 75% advisement and 25% teaching to 50%

advisement, 25% teaching and 25% administration. Her salary was increased for the 1976-77 academic year to $1,032 per month; in December 1976 she received a second equity pay raise that increased her salary to $1,062 per month. During the 1977-78 school year, Covington earned $1,210 per month, and during the following academic year, she was paid $1,371 per month. Covington was granted tenure during the 1978-79 academic term but was denied a promotion to assistant professor because she lacked a terminal degree in art. She was promoted to assistant professor effective in the fall of 1980 upon being awarded terminal degree equivalency.

Covington was dissatisfied with her salary from the time she was first hired by SIU. She believed that Lemasters had been paid more money for doing the same or less work than she performed. When she questioned Sullivan about her salary, he mistakenly told her that Lemasters was an assistant professor, and thus, she believed that the discrepancy in pay was explained by the difference in their rank. Although Lemasters' correct rank was listed in public documents, it was not until February 1980 that Covington discovered that Lemasters held only the rank of instructor.

In April 1980, Covington wrote to the dean of the College of Communications and Fine Arts, C. B. Hunt, claiming that her salary was inequitably low. Covington also brought her claim to the attention of the academic vice-president, Frank Horton. Both Hunt and Horton refused to take any action in response to her complaint. Covington then addressed her plea to the acting president of SIU, Hiram Lesar, who told Covington that a grievance regarding her salary would be untimely but that she could file a grievance regarding her current salary. On June 11, 1980, Covington filed a grievance, and President Lesar appointed a grievance committee to advise him regarding her complaint. After comparing her salary with the salaries of other assistant professors, the committee recommended that her salary be adjusted to bring it within the range of these other faculty members. The university attempted to negotiate with

Covington based on the findings of the grievance committee, but it was unable to reach an accommodation. Covington filed a charge with the Equal Employment Opportunity Commission on March 18, 1981 and received her right to sue letter on March 19, 1983. She filed the present suit on June 9, 1983.

II.

In the district court, Covington argued that the university discriminated against her by paying her $800 per month as a starting salary in 1974 when Lemasters made $1,080 per month in 1971 when he first began in the art advisor position and $1,280 per month during his last year in that post.[4]

The district court found that the plaintiff established a prima facie case under the EPA and Title VII: Covington established that she received less pay than a male for equal work requiring equal skill, effort and responsibility under similar working conditions. The defendants do not dispute this finding on appeal. Once a plaintiff has established a prima facie case of discriminatory compensation, the burden shifts to the defendant to establish by a preponderance of the evidence that the disparity is the result of the operation of any of three compensation methodologies (seniority, merit, or quantity or quality of production) or "any other factor other than sex." 29 U.S.C. § 206(d)(1)(i)-(iv) (1982).[5] The court found that the defendants

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[4] Covington also argued that the violation was of a continuing nature. She claimed that she would be making more now had she not started at such a low salary. In her view, she would have received the same number of merit raises even if her starting salary had been higher and these merit raises would have been higher because, she alleges, they were ultimately calculated as a percentage of her starting salary.

[5] These four defenses are set out in the EPA. Although they do not appear in Title VII, the Supreme Court has concluded that Title VII effectively incorporates the four defenses for purposes of wage discrimination claims brought under Title VII. *County of Washington v. Gunther*, 452 U.S. 161, 168 (1981).

sustained their burden of proving that the differential in pay between Covington's initial salary and Lemasters' salary during his term as art advisor was due to a factor other than sex:

> The salary last earned by Lemasters in his advisement capacity was based on his 5 years of full-time employment at SIU and his tenure status. Unlike plaintiff, Lemasters began his employment at SIU with a terminal degee in his field. He had also a certain local notoriety as a high school band director, while plaintiff's prior experience was quite limited. Plaintiff's initial salary of $800 per month was not a result of her sex, but rather was a reflection of her education and limited experience and the lack of available funds.

Mem. op. at 15-16. The district court also found that the salary disparity was explained in part by the university's sex-neutral policy of maintaining an employee's salary upon a change of assignment within the university and that Lemasters' initial salary of $900 per month as a music instructor "was a normal entry level salary considering his degree and prior experience." *Id.* at 15. The court found that the fact that SIU was undergong financial difficulties at the time Covington was hired also accounted for the difference in salary; after Lemasters left the art advisor position, the School of Art had to request new salary dollars to pay Lemasters' successor. *Id.* at 16.[6]

III.

On appeal, Covington contends that SIU did not carry its burden of establishing that the disparity in pay was caused by a factor other than sex. Plaintiff's primary argument is that factors other than sex for purposes of the EPA and Title VII are limited either to business-related reasons or, more narrowly, to factors that relate to the requirements of the job or to the in-

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[6] As an alternative holding, the district court found that Covington's claim was barred by the statute of limitations. Mem. op. at 17-19. Because we conclude that Covington loses on the merits of her claim, we do not reach the district court's alternative holding.

dividual's performance of that job. Covington contends that SIU's policy of retaining the salary of employees who change assignments does not fall within either of these categories. Covington further argues that the university has offered no reason other than its salary retention policy to justify the difference between her salary and that of Lemasters.

The plaintiff's contention that factors other than sex must be related to the requirements of the particular position in question has not been adopted in this circuit and was implicitly rejected in two cases. In *Patkus v. Sangamon-Cass Consortium,* 769 F.2d 1251, 1261-62 (7th Cir. 1985), this court upheld as a factor other than sex a reorganization of the employer that resulted in a male employee's being paid more than his female predecessor who was discharged prior to the implementation of the reorganization plan. In *Ende v. Board of Regents of Regency Univs.,* 757 F.2d 176 (7th Cir. 1985), male professors brought an EPA challenge to a university plan aimed at adjusting female faculty members' salaries in order to remedy past discrimination. The court upheld the plan as a factor other than sex even though it created isolated instances of salary disparities between female and male faculty members. *Id.* at 182-83. Neither the salary adjustment formula nor the reorganization was related to the performance of the employees who received the higher wage.

We conclude that SIU's salary retention policy qualifies as a factor other than sex. We do not believe that the EPA precludes an employer from implementing a policy aimed at improving employee morale when there is no evidence that that policy is either discriminatory applied or has a discriminatory effect.[7]

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[7] On appeal, the university claims that it adopted its salary retention policy to promote employee morale. Appellees' Brief at 19. An alternative explanation seems to have been offered in the district court. There was evidence suggesting that Lemasters was transferred to the art advisor position as a temporary measure and that he would be transferred back into the School of Music to assume the position of

Although we realize that a plaintiff need not establish discriminatory intent to recover under the EPA, we do not believe that the Act precludes an employer from carrying out a policy which, although not based on employee performance, has in no way been shown to undermine the goals of the EPA.

Covington cites a number of cases which suggest that courts should be wary of allowing employers to rely on employees' differing salary histories to explain present wage disparities. *See, e.g., Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) ("a factor like prior salary ... can easily be used to capitalize on the unfairly low salaries historically paid to women"); *Futran v. RING Radio Co.*, 501 F. Supp. 734, 739 n.2 (N.D. Ga. 1980) (Vining, J.) (giving prior salary more than nominal consideration perpetuates historic employment discrimination in wages suffered by females); *Neeley v. MARTA*, 24 FEP Cases (BNA) 1610, 1612 (N.D. Ga. 1980) (Vining, J.) (employer's practice of not paying employees more than 110% of previous salary perpetuates lower salary of women that might be the result of prior sex discrimination). The concern in these cases is that, although the policy of considering an employee's prior salary in setting his or her current wage is not

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music advisor when that post was open. In discussing the factor other than sex exception, the House Report accompanying the Equal Pay Act recognized:

> [I]t is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

House Comm. on Equal Pay Act of 1963, H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, *reprinted in* 1963 U.S. Code Cong. & Admin. News 687, 689. Defendants do not press this position on appeal, probably because it is not clear from the evidence that Lemasters was in fact transferred to art advisement with the intention that he would eventually take over a similar role in music and because the university's policy of maintaining salaries seems to be applied to faculty transfers in general, even if the new assignment is not temporary.

objectionable in itself, this policy may serve to perpetuate an employee's wage level that has been depressed because of sex discrimination by a previous employer.

But the issue before us is somewhat different than that decided in cases such as *Kouba*. The question here is whether the university can consider the prior wages that *it* paid an employee, rather than the wages paid by a previous employer. In *Kouba*, the court did not require that the discrimination by the prior employer be established, presumably because of the enormous difficulties involved in determining whether another business discriminated on the basis of sex resulting in lower wages for its female employees. Rather, the court noted that the plaintiff's lower wages *might* be due to prior discrimination, and because of this possibility, it held that prior salary could be a factor other than sex only if its use was business-related and it was actually taken into account in line with the employer's stated purpose. *Kouba*, 691 F.2d at 876. In cases like the one before us, however, in which the wage policy of only the present employer is involved, any presumption of prior discrimination has no place. The present employer should be permitted to consider the wages it paid an employee in another position unless this policy is discriminatorily applied or unless there is evidence independent of the policy which establishes that the employer discriminates on the basis of sex.[8] *See, e.g., Grove v. Frostburg Nat'l Bank*, 549 F. Supp. 922, 937 (D. Md. 1982) (court upheld as a factor other than sex employer's policy of not reducting salaries when employees were transferred or when their job assignments were changed); *Mangiapane v. Adams*, 19 Empl. Prac. Dec. (CCH) ¶ 9030 at 6414 (D. D.C. 1979) (agency's decision to maintain higher wages of incumbent program analysts after position had been downgraded was not unlawful even

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[8] Of course, if the current employer considered prior salary in setting an employee's initial salary, the same concerns that underlie *Kouba* would still be relevant. In this case, neither party has suggested that SIU took Covington's prior salary into account when it set her starting salary.

though new hires were paid at a lower rate: practice did not perpetuate prior unlawful discrimination, was not based on considerations of sex and was not discriminatory in application). Maintenance of an empoyee's compensation in a transfer between positions is not in our view unusual and avoids the serious problem of "unmerited" pay reductions.

Covington does not argue that the salary retention policy was applied discriminatorily. Her position is that SIU discriminated against her on the basis of sex in setting her starting salary. Covington argues that the university has offered no reasons related to job performance to explain the disparity between the salary at which she was hired and that paid Lemasters while he was art advisor. Appellant's Brief at 26.

We have already rejected Covington's premise that factors other than sex must be related to the higher paid employee's performance. The district court concluded that the disparity in salary between Covington and Lemasters resulted because of differences in education and experience and because of SIU's salary retention policy.[9] Our review of the district court's fin-

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[9] Plaintiff contends that factors such as experience and education are considered in determining whether the plaintiff has established her prima facie case (i.e., equal pay for equal work) and thus cannot be raised by the defendants as a factor other than sex. Plaintiff relies primarily on *Patkus v. Sangamon-Cass Consortium,* 769 F.2d 1251, 1260 (7th Cir. 1985), in which the court stated that it would not consider the male employee's higher educational qualifications as a factor other than sex because "the Equal Pay Act looks to the similarity of the actual duties involved, and does not turn on differences in job descriptions, prior training, or other factors" (citation omitted). However, any difference in educational qualifications was irrelevant to the outcome of *Patkus* because the court there concluded that the disparity in pay was the result of the employer's implementation of a plan of reorganization, which qualified as a factor other than sex.

It seems clear from the legislative history of the Equal Pay Act that factors such as experience and education operate as a defense rather than as part of the plaintiff's prima facie case. In discussing the factor

dings that these factors explained the salary disparity is governed by the clearly erroneous rule. Fed. R. Civ. P. 52(a).

When Lemasters was first hired by the School of Music in 1967 as a full-time instructor, he was paid $900 per month. At the time he was hired, Lemasters had considerable experience in the field of music, including extensive teaching experience. He also possessed a degree that qualified him for tenure and promotion within the School of Music. The district court found that Lemasters' initial salary "was a normal entry level salary considering his degree and prior experience." Mem. op. at 15. Lemasters received periodic raises between 1967 and 1971; by the time he transferred to the art advisement position, he was making $1,080 per month, and he kept this salary under SIU's salary retention policy. While Lemasters was art advisor, he received tenure in the School of Music. When he left the art advisor position to return to the School of Music in 1974, his salary was $1,280 per month. When Covington was hired in 1974, her teaching experience was much more limited than was Lemasters' at the time he was hired by SIU in 1967. Covington also lacked a degree that would qualify her for tenure and promotion within the School of Art. Plaintiff does not contest these factual findings. Instead, she contends that none of these differences in qualifications and education enhanced Lemasters' ability as an art advisor. Appellant's Reply Brief at 9. This contention may well be correct, but Equal Pay Act analysis is not so simple.

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other than sex exception, the committee report accompanying the House bill stated:

> Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on *experience, training,* or ability would also be excluded.

House Comm. on Equal Pay Act of 1963, H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, *reprinted in* 1963 U.S. Code Cong. & Admin. News 687, 689 (emphasis supplied).

The flaw in Covington's argument is that Lemasters' starting and ending salaries as art advisor were influenced by his previous period of employment in the School of Music. Lemasters spent his first four years at SIU as a music instructor, and his degrees in music and prior experience teaching music and operating a music store were relevant to the salary he was paid in that position. He started in the art advisor position at a salary of $1,080 because he had received periodic increases during the four years he taught in the School of Music, and he retained his salary upon transfer. During the three years he served as art advisor, his salary was gradually raised to $1,280 per month. The district court found that the increases that Lemasters received during this period were based on his years of full-time employment with SIU and the fact that he was tenured. At the time Covington was hired, Lemasters had seven years experience at the university and was tenured; although his formal training was in the field of music, he had three years experience in the art advisor position at the time he left that post.

The district court concluded that Covington's low starting salary was also the result of the financial emergency that SIU was experiencing at the time she was hired. Mem. op. at 16. Lemasters' salary had not been paid out of the budget of the School of Art; when he left the art advisement position the School of Art had to request additional funds to pay his successsor. Plaintiff does not contest the existence of the financial emergency. Appellant's Reply Brief at 10. Instead, because it was the policy of the university that its financial problems would not alter its obligations under its affirmative action programs, including its obligations under the EPA, Covington argues that SIU cannot use the financial emergency to explain her low starting salary. The section of the resolution declaring the financial emergency, to which plaintiff directs our attention, states that cutbacks in programs and services will be made "without sacrificing the University's duty and commitment to an Affirmative Action Program." *Resolution Declaring Financial Exigency on the Basis of IBHE FY75 Budget Recommenda-*

tions and Directing Certain Administrative Actions at 669 (the "*Resolution*"), Appellant's Appendix at 295.

This argument may appear to undermine SIU's ability to use its financial crisis as a factor other than sex justifying a disparity in pay. But this provision of the Resolution is somewhat vague, and it would be difficult to read into it a specific commitment on pay. The Board may simply have meant that it would pay careful attention to the position of women and minorities within the university, not that it would refrain from across the board salary reductions for new employees. Even if the university may not raise its financial crisis as a factor other than sex, however, the other reasons for the disparity found by the district court sufficiently explain the difference in salary.[10] Covington herself concedes that if Lemasters' prior salary history is a factor other than sex, the university need not rely on the financial emergency. Appellant's Reply Brief at 11.

IV.

For the foregoing reasons, we affirm the determination of the district court that the university established that the disparity in salary between Covington and Lemasters was the result of a factor other than sex.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[10] Covington also argues that the university may not use the financial emergency to explain her low salary because, during the existence of this fiscal crisis, Lemasters received a $57 per month increase in salary when he transferred back to the School of Music in 1974. The resolution issued by SIU's Board of Trustees,, however, states that cutbacks are to be made "without sacrificing salary increases." *Resolution* at 669, Appellant's Appendix at 295.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 83-4138

Patricia Covington,
Plaintiff,

v.

Southern Illinois University, et al.,
Defendants.

MEMORANDUM AND ORDER

FOREMAN, Chief Judge:

Before the Court is plaintiff's Motion for Leave to File Reply Instanter. Plaintiff's Motion (Document 111) is hereby GRANTED. The central issue presently before the Court is whether plaintiff should be allowed to reopen her case in rebuttal. After defendants rested in the bench trial of this matter, plaintiff requested the Court to compel the defendants to produce certain records which she believed would discredit Philip Olsson's testimony. This is a Title VII case in which plaintiff claims that defendants discriminated against her on the basis of her sex because her predecessor in an advisement position, Don Lemasters, was paid a greater salary than she was for doing the same or less work. Olsson's testimony was relevant to the issue of whether Lemasters had teaching duties in addition to his duties as an advisor prior to plaintiff's replacement of Lemasters. The theory of plaintiff's case is that Lemasters only acted as an academic advisor and that when she replaced him she performed both advising and teaching duties while being paid less. Olsson testified that Lemasters did teach a trumpet repair course during the relevant time period. Plaintiff claimed surprise at this testimony and requested the Court to order the defendants to come up with any records they had regarding

Olsson's testimony that Lemasters taught in the School of Music. The Court complied with plaintiff's request and instructed the plaintiff to move to reopen her case in rebuttal by November 1, 1985 if she found the documentation favorable to her position. On October 30, 1985 plaintiff requested and was given an extension of time until November 8, 1985 to file her post trial brief. On November 12, 1985 plaintiff filed a Motion for Leave to file her brief instanter. This motion was granted by the Court on November 20, 1985. It was not until December 9, 1985 that plaintiff requested to reopen her case in rebuttal, claiming the documents produced by the defendant were "unclear and equivocal". Plaintiff seeks leave of Court to serve on the defendants a request for admission and one interrogatory with seven subparts which address the issue of Lemasters's teaching duties during the relevant time period.

The Court is not persuaded that plaintiff's Motion to Reopen has merit. Although the Court agrees with plaintiff that "a search for the truth" is the basis of every trial, it is also true that there must be some finality to every proceeding. This is not a situation where plaintiff possesses relevant evidence which she wishes the Court to consider. Rather, in the present case plaintiff seeks to discover information which she is not sure will even aid her case. The Court agrees with defendants' observation that if the proposed discovery were allowed it is conceivable that plaintiff would request further discovery to clarify the evidence she discovers. The Court also notes that Olsson's testimony on this issue does not stand uncontradicted. As noted by plaintiff, the testimony of Robert House, the Director of the School of Music during the relevant time, was to the effect that Lemasters performed no functions in the School of Music while acting as an advisor in the School of Art. Plaintiff was free to argue in her briefs and before the Court that House is a more knowledgeable and credible witness than Olsson. Finally, the Court does not find that this testimony is dispositive of plaintiff's case as is more fully discussed herein. Accordingly, plaintiff's Motion for Leave to Reopen Her Case In Rebuttal (Document 109) is hereby DENIED.

THE MERITS OF THE CASE

This is an action for violation of Title VII, 42 U.S.C. § 4200(e) and the Equal Pay Act, 29 U.S.C. § 206(d)[1]. Plaintiff claims that defendants discriminated against her on the basis of sex by paying her less than her male predecessor for doing the same job. On October 21, 22, 23 and 24, 1985, a bench trial was held in this matter. Based upon all of the evidence and arguments presented in this cause, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Southern Illinois University (SIU) is a fully accredited single system with two universities, Southern Illinois University at Carbondale (SIU-C) and Southern Illinois University at Edwardsville (SIU-E). SIU is a body politic and corporate created by the State of Illinois. SIU-C and SIU-E are governed by the Board of Trustees of SIU, a body politic and corporate.

The College of Communications and Fine Arts is composed of the Schools of Art, Music and Journalism, and the Departments of Cinema and Photography, Radio, Television, Speech Communication, Communication Disorders and Sciences, and Theater. The College of Communications and Fine Arts, like other schools or colleges within the University, is headed by a Dean. If an academic unit within a school or college needed to fill a position, the academic unit would usually have to justify the position to the Dean. Enrollments, budgets, qualifications of younger candidates and the uniqueness of the position are all factors considered in assessing the need for the position. If the

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[1] Plaintiff's claim based on 42 U.S.C. § 1983 was dismissed by the Court after plaintiff, upon resting her case, informed the Court that she was no longer pursuing this claim. Plaintiff also at that time agreed to dismiss all of the individual defendants except Albert Somit and Brent Kington.

Dean approved the position, the next level of approval was with the Office of the Vice President of Academic Affairs and Research. If the position is authorized by the Office of the Vice President and a corresponding rank and salary level approved, the vacancy is usually advertised.

When a faculty position is vacated, there is no automatic procedure whereby the salary of the departing faculty member is available to the new faculty member. Initial hiring salaries are affected by the University's financial condition at the time of the hiring as well as the candidate's prior experience, rank, education and the market for his services. Other factors include guidelines specifying the ranges of salaries by rank. Faculty rankings at SIU-C are as follows: lecturer, instructor, assistant professor, associate professor and professor. Often the department would seek to fill the position with a younger person so that a lower salary would be paid.

Increases in salaries are recommended by a unit's Departmental Executive Officer (DEO) to the Dean and are approved by the Dean. Merit raises are in theory awarded to faculty based on an estimation of that individual's worth to the department, although human factors also sometimes come into play. Annually, certain amounts of money become available for faculty salaries. Each dean awards the money in lump sums to his department chairman who recommends the award of merit raises to deserving faculty members. Rank promotions and tenure also affect salary.

Effective October 15, 1968, Violet Trovillion had a change in assignment from 100% assignment in art to a 50% assignment as academic advisor for the School of Fine Arts[2] and 50%

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[2] Testimony at trial indicated that the School of Fine Arts merged with the School of Communications at a later date to form the College of Communications and Fine Arts.

assignment in art. Trovillion's total monthly salary of $1,170 was not affected by the change of assignment except that half of her salary was paid through the School of Fine Arts' budget and half was paid by the Art Department budget.

On January 5, 1970, Trovillion's assignment was again changed to a 75% assignment as academic advisor to the School of Fine Arts and a 25% assignment to art. Trovillion's total monthly salary of $1,280 was not affected by the change except that 75% of her salary was paid by the School of Fine Arts and 25% by the Art Department. Trovillion continued in this capacity until her retirement at the end of the Summer Quarter of 1971. At that time she was earning $1,360 per month.

Don Lemasters replaced Violet Trovillion as academic advisor for the College of Communications and Fine Arts and Art Students. Lemasters received his Bachelor of Music degree from the St. Louis Institute of Music in 1948 and his Masters of Music degree from Northwestern University in 1949. Although there is some difference of opinion on this issue, the Masters of Music degree appears to be regarded as a terminal degree in the School of Music. A terminal degree qualifies one for promotion and tenure within a department at SIU-C.

Prior to his employment as advisor for the College of Communications and Fine Arts, Lemasters had held various positions. From 1942 through 1951, he was a professional trumpet player. From 1948 through 1967, he was a band director at various grade schools, high schools, and music camps. From 1952 through 1955, he was a partner in a music store. Lemasters was initially employed part-time at SIU-C as a lecturer in trumpet and French Horn. In August of 1967, Lemasters was hired on the recommendation of the Music Chairman and DEO, Dr. House, to fill a vacancy in the Music Department created by the enlistment of a trumpet instructor, Larry Franklin, in the military. Fraunklin was given the option of returning after his service in the military was completed. Lemasters was hired as a

full-time instructor teaching brass instruments and his salary was $900 per month. By the 1970-71 school year, Lemasters made $1,080 per month. When Larry Franklin returned from military service, Dr. House attempted to secure an added position for Lemasters. In a memo written to the Dean of the College of Communications and Fine Arts, Dr. House stated "Mr. Lemasters has been deliberately trained as a replacement for Mr. Wharton in music advisement whose retirement might occur any time soon. The low salary and rank involved here might also make this an easier item to add." The fact that Lemasters was to replace Wharton in music advisement is also evident from a memo to Dr. Willis Malone, the Vice Chancellor, from Assistant Dean to the College of Communications and Fine Arts, Philip Olsson, which states in part "As you know, we have employed Don Lemasters to replace Violet Trovillion as the Art Advisor with the understanding that when John Wharton retires he will, undoubtedly, transfer over to music advisement."

In the Summer of 1971, the Dean of the College of Communications and Fine Arts approved the employment of Lemasters for one summer month so that he could learn the duties of Art Student and College of Communications and Fine Arts advisement. Lemasters was employed to fill the vacancy created by Trovillion's retirement. Lemaster's salary did not change upon his change in assignment. The fact that Lemasters retained his prior salary upon reassignment was consistent with the University's policy that a change of assignment does not result in a decrease in salary. This policy benefited makes and females employed at SIU-C. Lemaster's assignment was 75% to the College of Communications and Fine Arts and 25% to the School of Music. Although Lemasters advised art students, his salary was not part of the Art School budget. Lemaster's salary was increased in December of 1971 to $1,140 per month.

Lemasters was granted tenure in the School of Music effective the Fall of 1972. His assignment remained the same but his

salary was increased to $1,200 per month for the 1972-1973 school year. From the time of his change in assignment, Lemasters may have taught a class on trumpet repair as well as advising art students.[3] During the 1973-1974 school year, Lemasters may have advised music students as well as art students. His salary during that academic year was $1,280 per month.

In the Fall of 1973, Professor Milton Sullivan became the Director of the School of Art. Sullivan determined that Lemasters should be replaced. After Lemasters had a heart attack in May of 1974 and was placed on medical leave through the Summer term, advisement was performed by a civil service secretary. It is no uncommon for such personnel to act as advisors. In June of 1974 Sullivan met with the Provost, Dr. Leasure, and obtained his authority to get Lemasters transferred. Lemasters was reassigned to the School of Music effective July 1, 1974. In the Fall of 1974 he began full-time teaching in the School of Music with the rank of instructor and continued this assignment until his death in September of 1981.

On July 3, 1974 Sullivan wrote the Assistant to the Provost seeking to replace Lemasters with the plaintiff, Patricia Covington. Sullivan suggested that the salary start at $800 per month and that the assignment be 75% art advisement and 25% art education. Sullivan reiterated this request on July 16, 1974, and on July 26, 1974 he requested authority from the Provost to fill the art advisement position. In July of 1974 Covington was hired at the $800 per month salary and began advising undergraduate art students. At the time Sullivan proposed this

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[3] Testimony on this point was conflicting. Philip Olsson who was the Assistant Dean to the College of Communications and Fine Arts for 1971 and Professor in the School of Music thereafter testified that such a course was taught by Lemasters. Lemaster's appointment indicted a 25% assignment as a music instructor from 1971-1974. Other testimony, however, conflicted with this evidence.

salary, he had no idea what Lemasters's salary was since Lemasters's salary did not come out of the Art Department budget. Sullivan was quite impressed with plaintiff's abilities and her work and, as a consequence, sought raises and promotions for her regularly. Sullivan testified that the $800 per month salary was within reasonable expectations of instructors in his department. Sullivan stated that the salary was based upon an evaluation of the position, the candidate's qualifications, and guidelines specifying the ranges of salary by rank. He did not feel that Covington was in an unequal position. At the time of Covington's hire, the University was in a period of financial exigency[4], and as a result, salary dollars were difficult to obtain. Sullivan needed new salary dollars for the advisor position because there had previously been no budget in the Art Department for Lemasters's position.

On August 9, 1974 Covington was awarded the Masters of Science of Education degree by the School of Education. This degree did not qualify her for tenure or promotion within the School of Art and was thus not considered a terminal degree. At the time Covington was hired at SIU she had little prior teaching experience. She had been a teaching assistant in the School of Art beginning in 1972 while obtaining her degree of Masters of Science in Art Education and taught one year in public schools.

On August 9, 1974 Covington was employed with the rank of Instructor and an assignment of 75% advisement and 25% instruction. Covington performed all advisement duties which Lemasters had in the School of Art and also taught classes.

Effective December, 1974, Covington's salary increased to $879 per month. This raise was due to an equity study done by the University designed to identify those with inequitable salaries and to adjust those salaries with available dollars. In the

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[4] The University terminated numbers of tenured and nontenured faculty members.

1975-1976 school year, Covington earned $987 per month and kept her original assignment until June of 1976 when her duties were changed to 50% advisement, 25% teaching and 25% administration. Her title was changed to Assistant to the Director of the School of Art. In the 1976-1977 school year, Covington's salary ws $1,032 per month until December of 1976 when a second equity raise increased her salary to $1,062 per month. In the 1977-1978 academic year, Covington was paid $1,210 per month and for the 1978-1979 school year she earned $1,371 per month. Beginning her fourth year of employment at SIU-C, Covington earned more than Lemasters made during his fifth year of employment at SIU and his final year as an academic advisor for the College of Communications and Fine Arts. During her employment at SIU-C, Covington received many merit raises and did an outstanding job.

During the 1978-1979 academic year, Covington applied for both promotion and tenure. Covington was granted tenure that year but was denied promotion to Assistant Professor due to her lack of a terminal degree in Art. Covington appealed the denial of promotion but the grievance was denied by SIU's president and no further steps were taken. Covington reapplied for promotion for the 1979-1980 academic year and was promoted to the rank of assistant professor effective Fall of 1980. The promotion was due to her being awarded terminal degree equivalency for purposes of the Masters of Fine Arts degree.

Covington consistently voiced dissatisfaction about her salary from the time of her initial hire. She felt that Lemasters had made more money for doing the same or less work than she had. She was told by Sullivan that Lemasters was an assistant professor and she assumed that the difference in their rank explained the discrepancy. The Undergraduate Catalogs published by the University and the personnel listings of the University for the years in question all list Lemasters as an instructor. These are documents which are available to the public. Although Lemasters remained on campus until his death in 1981, plaintiff did not ask him what his rank was until February 8, 1980 after

she learned of his rank while doing research for her dissertation on the history of the School of Art at SIU.

On April 10, 1980 Covington wrote to the Dean of the College of Communications and Fine Arts, C. B. Hunt, claiming that a salary inequity existed in her salary from the time she was hired in 1974. Hunt replied, "There is no action which I can or wish to take as a result of your letter of April 10, 1980." Covington voiced another complaint to the Academic Vice President, Frank Horton, in a letter written April 17, 1980. Horton replied that he felt no action was justified. On April 29, 1980, Covington complained about her salary to SIU President Lesar. Lesar replied that any grievance regarding her prior salary was untimely but that she could file a grievance regarding her present salary. On June 11, 1980 Covington filed a grievance, and a grievance committee was appointed by President Lesar to advise him about her grievance. On December 17, 1980 President Somit wrote plaintiff advising her that the grievance committee compared her salary with other assistant professors who were in the School of Art since 1974 and recommended that her salary be adjusted to bring it within the range of these faculty; no specific amount was recommended. Somit also stated that Covington had been promoted to the rank of assistant professor that year while other assistant professors had been in that rank several years longer. Somit went on to state that "Your present salary of $1,796 per month compares with a range of $1,864 to $2,144 per month for the other assistant professors." Somit, however, informed Covington that he would accept the principle of the Committee's recommendation and asked the Acting Vice President for Academic Affairs and Research, John Guyon, to meed with Covington and determine a salary adjustment. Covington refused to accept the University's offer of $100 per month raise.

Covington filed her charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) on March 18, 1981. On March 19, 1983 plaintiff was given a right to sue letter from the EEOC and the present suit was instituted

on June 9, 1983.

CONCLUSIONS OF LAW

This Court has jurisdiction over the subject matter of the claims presented under Title VII, 42 U.S.C. § 2000(e)5(f)(3) and under the Equal Pay Act, 29 U.S.C. § 216(d).

The Defendant Board of Trustees is an employer within the meaning of Section 701(b) of Title VII, 42 U.S.C. § 2000(e)b and Section 3(d) of the Equal Pay Act, 29 U.S.C. § 203(d). Defendants Brent Kington and Albert Somit are not employers within the meaning of the aforementioned acts. In addition, there has been no showing by the plaintiff of any action or conduct which would render these defendants individually liable. Accordingly, defendants' Motion for an Involuntary Dismissal is hereby GRANTED as to Defendants Kington and Somit.

In an Equal Pay Act claim, the plaintiff bears the initial burden of proof that she was paid less wages than a male employee "for equal work on jobs, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions." *Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974). A plaintiff may sustain this burden by demonstrating that the jobs in question are substantially equal. *Shultz v. Wheaton Glass Co.,* 421 F.2d 259, 265 (3d Cir.), *cert. denied,* 398 U.S. 9 (1970).

Once a plaintiff has established a prima facie case under the Equal Pay Act, the burden of proof shifts to the employer to establish that one of the Act's four affirmative defenses was the reason for the wage differential[5]. *Corning Glass Works,* 417 U.s. at 196-7.

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[5] "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quanitity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1).

The four affirmative defenses found in the Equal Pay have been incorporated into Title VII *County of Washington v. Gunther,* 452 U.S. 168-171(1980). Thus, where plaintiff's Title VII action is based on wage discrimination for equal work, and plaintiff has established a prima facie case, the defendant must prove the existence of one of the Act's defenses rather than merely articulate a legitimate non-discriminatory reason for its action. *Kouba v. Allstate Insurance Co.,* 691 F.2d 873, 875 (9th Cir. 1982), *Ammons v. Zia Company,* 448 F.2d 117, 119 (10th Cir. 1971); *Miller v. Kansas Power & Light Co.,* 585 F. Supp. 1509, 1512 (D. Kan. 1984); *Marcoux v. State of Maine,* 35 F.E.P. 55 (D. Maine 1984); *Melani v. Bd. of Higher Education of City of New York,* 561 F. Supp. 769, 781 n.20 (S.D.N.Y. 1983); *Lanegan-Gimm v. Library Assn. of Portland,* 560 F. Supp. 486, 488 (D. Ore. 1983); *Schulte v. Wilson Industries, Inc.,* 547 F. Supp. 324, 339-340 (S.D. Tex. 1982).

In the present case, plaintiff sustained her burden of establishing a prima facie case that she made less than her male predecessor Lemasters while performing work equivalent or greater to that which Lemasters did as an academic advisor. Plaintiff proved that her and Lemasters's job required equal skill, effort, and responsibility and were performed under similar conditions. The Court, however, finds that the defendants sustained their burden of proving by a preponderance of the evidence that the plaintiff's initial wage differential was based on a factor other than sex.

Lemasters's initial salary of $900 per month at SIU-C as a music instructor was a normal entry level salary considering his degree and prior experience. Upon his change in assignment to advisor, he retained the salary he was receiving in the School of Music of $1,080 per month. The University's policy that salary be retained upon a change in assignment was sex-neutral and partially accounted for the initial salary discrepancy between Lemasters and Covington. When Lemasters left the advisory position, his salary of $1,280 per month was increased to $1,330

upon transfer. The salary last earned by Lemasters in his advisement capacity was based on his 5 years of full-time employment at SIU and his tenure status. Unlike plaintiff, Lemasters began his employment at SIU with a terminal degree in his field. He had also a certain local notoriety as a high school band director, while plaintiff's prior experience was quite limited. Plaintiff's initial salary of $800 per month was not a result of her sex, but rather was a reflection of her education and limited experience and the lack of available funds. Since Lemasters's salary as an advisor was not part of the Art School budget, new salary dollars were needed to fund the position. These dollars were difficult to come by due to the financial exigency which SIU was experiencing at the time of plaintiff's employment. There was absolutely no evidence presented to cast doubt on the financial emergency which existed at the time, other than the implication proferred by plaintiff that Lemasters was retained and given a position in the Music Department at this time of exigency when there was in fact no need for his services. This inference is based upon a memo from Robert House, the Director of the School of Music, to Dean Stuck which stated that there was no position for Lemasters in the School of Music upon his replacement in art advisement. Plaintiff argued that Lemasters was kept on solely because he had friends within the University. However, preferential treatment due to having friends is not the equivalent of sex discrimination. That is, if plaintiff was treated less favorable than Lemasters because he had more friends than she did, there is no remedy for friendship-based discrimination. *See Lamphere v. Brown University,* 685 F.2d 743, 750 (1st Cir. 1982). In addition, Philip Olsson testified that House was relieved of his position shortly after writing the memo; House was no longer the department chairman for the 1975-1976 academic year. House's memo was not conclusive[6] on this issue

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[6] The memo's reference to the fact that Lemasters was unwisely tenured also refers to Lemasters's friends and connections. *See* House depo-at 30. However House also recommended that Lemasters be promoted to the rank of assistant professor the year before the memo

especially since Lemasters did in fact return to the music department as an instructor and continued as such until his death.

The Court also found it persuasive that Lemasters's predecessor, a female, was paid $1,360 per month at the time of her retirement while Lemasters's initial salary for performing substantially the same work was considerably less. In sum, the court finds that SIU has established policies of equal employment opportunity without regard to sex. Defendant sustained its burden of showing that the pay differential between plaintiff and Lemasters was based on a factor other than sex and plaintiff failed to show that defendants' proof was pretextual[7].

Alternatively, the Court finds that plaintiff's claim is barred by the applicable statutes of limitations.

In order to succeed in her Title VII claim, plaintiff must show that she received less pay than a male performing equal work within 300 days prior to her filing of her March 18, 1981 charge with the EEOC. *See* 42 U.S.C. § 2000(e)5(e). For plaintiff to succeed in her Equal Pay Act claim, she must show that she received less pay than a male performing equal work within 3 years from the date she filed her complaint on June 9, 1983 if the violation is willful. *See* 29 U.S.C. § 255(a). Fro 1978 on plaintiff earned more in her fourth year of employment at SIU than Lemasters made in 1974 in his fifth year of employment at SIU. Although her salary was increased in part due to merit

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was written and testified that Lemasters's "four years working in Music...was competent and deserving of tenure if there had been a position." The Court suspects that the memo was also written for "subtle reasons" and in any event does not find it sufficient to prove that the financial exigency was a pretext for defendants' alleged sexual discrimination against the plaintiff.

[7] The Court also notes for the record that plaintiff appeared to choose to base her case solely on the theory of unequal pay for equal work. The proof at trial supported no other possible theory of recovery such as disparate treatment or disparate impact.

awards, there was no evidence that Lemasters's increases in salary were also not due to merit increases. The argument that she would have received the same merit increases had her salary been the same as Lemasters is speculative; although merit raises are in theory based on the recipient's worth to the department, Milton Sullivan testified that other human factors come into play. Sullivan in fact inferred that he did not find plaintiff to be in an inequitable position since he tried to benefit her with salary increases; his motivation to give such increases may have been lessened had plaintiff initially earned more money[1].

Although the Court in an earlier order denied defendants' Motion to Dismiss based on the statute of limitations, that order is not, as suggested by plaintiff, conclusive on the issue. Motions to dismiss involve allegations only and such allegations must be supported by evidence at trial. In this case plaintiff's evidence failed. She simply did not sustain her burden of proving that she was paid less wages for equal work within the applicable time periods. Nor can plaintiff benefit from an equitable tolling doctrine based on wages earned prior to those dates. At the latest, plaintiff discovered her claim on February 9, 1980 when she learned that Lemasters had the rank of instructor. Even by these standards, her change and subsequent lawsuit were untimely. At trial plaintiff appeared to argue that her attempt to grieve her claim within the University procedures somehow tolled the statutes of limitations. It is well established, however, that resort to a grievance process does not toll the limitations period. *International Union of Electrical Radio & Machine Workers, Local 790 v. Robbins & Meyers, Inc.*, 429 U.S. 229, 238-40 (1976).

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[1] The Court does not imply that plaintiff's performance was such that she did not deserve merit raises, but there was testimony by C. B. Hunt that others also were just as deserving as she of raises and that hers was not a special case.

Accordingly, the Court hereby finds for the defendants and against the plaintiff and hereby ORDERS the Clerk to enter judgment in favor of the defendants and against the plaintiff.

IT IS SO ORDERED.

DATED: February 24, 1986

/s/ James L. Foreman
Chief Judge

APPENDIX C

29 USCS § 206

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

APPENDIX D

42 U.S.C. § 2000e-2

§ 2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive

or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

APPENDIX E

29 U.S.C. § 800.142 Sex must not be a factor in excepted wage differentials.

While differentials in the payment of wages are permitted when it can be shown that they are based on a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or on any other factor other than sex, the requirements for such an exception are not met unless the factor of sex provides no part of the gasis for the wage differential. If these conditions are met, the fact that application of the system for measuring earnings results in higher average earnings for employees of one sex than for employees of the opposite sex performing equal work would not constitute a prohibited wage differential. However, to come within the exempting provisions, any system or factor of the type described pursuant to which a wage rate differential is paid must be applied equally to men and women whose jobs require equal skill, effort, and responsibility and are performed under similar working conditions. Any evaluation, incentive, or other payment plan which establishes separate and different "male rates" and "female rates" without regard to job content will be carefully examined to determine if these rate differentials are based on sex in violation of the equal pay requirements.

APPENDIX F

Equal Employment Opportunity Commission
29 CFR Part 1620
The Eqal Pay Act, Interpretations

Agency: Equal Employment Opportunity Commission (EEOC)

Action: Proposed rules.

Summary: Pursuant to Reorganization Plan No. 1 of 1978 and E.O. 12144, responsibility for enforcement of the Equal Pay Act (The Act) was transferred from the Department of Labor to the EEOC. Pursuant to that authority, the Commission proposes interpretations with respect to the enforcement of the Equal Pay Act. These interpretations would replace those issued by the Department of Labor at 29 CFR Part 800.

§ 1620.12 Permissible bases for pay differentials.

(a) Pay differentials between men and women employees may be permissible under the Act if based upon one or more of the following factors: (1) A merit system, (2) a seniority system, (3) a system based on quantity or quality of production, and (4) other systems or criteria based on "any other factor other than sex." None of these systems is a valid defense, however, if sex discrimination is any element of it either expressly or by implication. For instance, a seniority system which provides periodic increases is invalid if it prescribes dual wage rates for men and women performing equal work. A trainee program from which women employees are excluded and which is claimed as a basis for making a differential between male and female employees is invalid and discriminatory and therefore is not a defense.

(b) In determining whether such systems or employment practices are valid explanations of the pay differential, the following principles are applied:

(1) The standard system or test must be completely non-discriminatory and lacking any element of sex discrimination either expressly or impliedly.

(2) It must be uniformly applied to men and women employees.

(3) The system must be bona fide and must be the genuine basis of the pay differential.

(4) Even though the standard, system or test is neutral on its face, and purports to be based on a factor other than sex, it is discriminatory if it has an adverse impact on members of one sex in providing them in lower rate of pay and if it cannot be shown to be related to job performance.

(c) The employer has the burden of proving the existence of such seniority system, merit system, or other system based on factors other than sex. ———

APPENDIX G

Equal Employment Opportunity Commission
29 CFR Part 1620
The Equal Pay Act; Interpretations

Agency: Equal Employment Opportunity Commission [EEOC]

Action: Final rules.

Summary: Pursuant to Reorganization Plan No. 1 of 1978 and Exec. Order No. 12144 responsibility for enforcement of the Equal Pay Act was transferred from the Department of Labor to the EEOC. Pursuant to that authority, the EEOC publishes its final interpretations of the Equal Pay Act. With the publication of these final regulations, employers may no longer rely upon the Department of Labor's EPA interpretations at 29 CFR Part 800 or the Department of Labor EPA opinion letters.

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. . . In response to some comments received, § 1620.12 as proposed was deleted because the Commission believes that it did not provide adequate guidance. Sections 1620.19 through 1620.26 contain more specific guidance on defenses under the Act.